United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

No. 6002

B

Brief of Appellant

NO. 76-6084

UNITED STATES COURT OF APPEAL

FOR THE SECOND CIRCUIT

JOHN W. FITZGERALD,

plaintiff-appellant

v.

DONALD R. DEVARNEY, et.al.

defendants - appelees

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal taken by John W. FitzGerald from the findings of fact, opinion and order entered by the Honorable Albert W. Coffrin, of the United States District Court for the District of Vermont in the case of John W. FitzGerald vs. Donald R. Devarney, individually and in his capacity as Postmaster of the Post Office in Milton, Vermont, et. al., Civil docket 74-164, on February 17, 1976.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court commit error when it considered as mitigation earnings which the plaintiff-appellant would have made if he had been properly reinstated in his position as a rural carrier pursuant to 50 U.S.C. App. §459 (e),(b),(c) and 38 U.S.C. § 2021 et. seq. and/or the Back Pay Act, 5 U.S.C. § 5596?

2. Did the District Court commit error by refusing to consider as lost wages overtime earnings which the plaintiff-appellant would have earned had he been properly reinstated?

3. Did the District Court err in its refusal to consider as damages expenses incurred by the plaintiff- appellant by his efforts to mitigate damages and seek reinstatement?

4. Did the District Court err by refusing to restore plaintiff-appellant to his exact position in the Postal Service when such position was available and he was qualified to fulfill its duties?

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STATEMENT OF THE CASE

This case was commenced on June 27, 1974 by the filing of a complaint on behalf of John W. FitzGerald in the United States District Court for the District of Vermont. The complaint, which invoked jurisdiction of the court pursuant to the Selective Service Act of 1967, (50 U.S.C.A. App..§§ 451 et.seq.) 5 U.S.C.A. §§ 2108, 7501, 7511, and 7512; and the Postal Reorganization Act of 1970, Public Law 91-375, Appendix, p. 6, requested the court to order the defendant United States Postal Service to reinstate Mr. FitzGerald in his position with the postal service and further sought compensatory damages of $25,000.00 and punitive damages of $25,000.00.

Mr. FitzGerald is a veteran and a member of the Air National Guard. On December 15, 1959, FitzGerald was appointed to the position of career rural carrier in the Milton, Vermont Post Office. Mr. FitzGerald served in his capacity of rural carrier until November 2, 1970, when he was ordered into active duty by the United States Air Force. Appendix, p. 19.

Commencing on or about 1966, Mr. FitzGerald's relationship with the Milton Postmaster, defendant Donald Devarney, became strained. Mr. FitzGerald's Guard duties became a source of disagreement, which rapidly escalated in 1970 when Mr. Devarney began to object to FitzGerald's mehtod of taking leave without pay (LWOP) to perform his military obligations. Appendix p. 23. In mid 1970, Postmaster Devarney began initiating

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adverse actions against FitzGerald to dismiss him for being absent without leave.

On November 2, 1970, FitzGerald commenced active duty with the National Guard for a period of slightly less than two years. Appendix, p. 25. On November 3, 1970, postmaster Devarney issued a renewed Notice of Proposed Adverse Action to FitzGerald to dismiss him from his position based on claims that FitzGerald had been AWOL during the period between July 15th and October 15, 1970. Appendix, p. 29. On April 13, and May 24, 1971, the Regional Director sustained Devarney's adverse actions. On August 31, 1971, the Board of Appeals and Review of the United States Postal Service affirmed the dismissal. Appendix, p. 29.

After his release from active duty in August, 1972, FitzGerald applied for reinstatement to his position at the Milton, Vermont, Post Office. His request was denied on or about September 1, 1972, and from that date FitzGerald sought reinstatement. Appendix, p. 30.

In the court below, FitzGerald prevailed in his argument that the United States Postal Service wrongfully terminated him from employment and thus the refusal to reinstate him was rendered illegal under the Selective Service Act and the Veteran's Reemployment Rights Act, 38 U.S.C. §§ 2021, 2023. Appendix, p.35. Defendant's appeal from this decision has been dismissed by this Court. The lower court refused, however, to award FitzGerald any of the damages which he claimed stemmed from the Postal Service's wrongful discharge and refusal to reinstate. Appendix, p.39.

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It is from this refusal that FitzGerald appeals.

Specifically, FitzGerald claimed that he was entitled to damages sustained (1) from his loss of his Post Office earnings, see Appendix pp.63-68, 124-125, (2) from travel expenses incurred in employment duties he undertook while seeking reinstatement, Appendix, pp. 114-115, 120, and (3) from attorney's fees and court costs incurred in pursuing his right to reinstatement. Other claims for damages were either upheld by the court or are not being pursued upon appeal.

The essential error committed by the court lies in its determination of the appropriate method of calculating damages and mitigating earnings. While all parties seem to agree that Mr. FitzGerald was entitled to actual losses sustained regardless of the particular statute invoked to support his claim to lost earnings, the key dispute was and is over what earnings can properly be treated as mitigation.

FitzGerald and the court used the same starting point for calculating damages, i.e. September, 1972. Appendix, p. 62. In its simplest terms, FitzGerald calculated lost earnings by the following method:

1. He calculated the gross wages he would have earned from the Post Office.

2. He calculated his military pay that he would have received from the Air National Guard while he was working at the Post Office. It is undisputed in this case that

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FitzGerald performed a fixed number of drills, active duty days, additional flying training periods (aftp's), and unit training assemblies (UTA's) while working for and being paid by the Post Office for which he received military compensation. Appendix, pp. 89-91.

3. He totaled his Postal Service pay and his military pay and then subtracted the pay he actually received from the military. This figure represented his loss in earnings. Appendix, pp. 63-66.

The lower court sustained defendant's objections that plaintiff should not be allowed to testify to loss of earnings from military pay as a wage loss for which he was owed compensation by the Postal Service. Appendix, pp. 66-67. FitzGerald countered that he was not asking the Court to restore to him wages lost from military service. He argued instead that those wages received from the military that would have been earned regardless of his employment status with the Postal Service not be used to mitigate damages. Appendix, pp. 67-68. The lower court disagreed with FitzGerald and ordered him to calculate lost earnings by subtracting all military pay received by him - whether or not those earnings resulted from employment actually replacing his Postal Service duties - from the earnings he would have made through his Post Office position alone. Appendix, pp. 69. See also Appendix, pp. 100-106 for the court's examination of FitzGerald.

The claim before this Court on appeal is that the lower

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court committed an error by requiring FitzGerald to calculate as mitigation earnings he received whether or not he worked for the post office. This error seems to stem from some confusion as to FitzGerald's actual demand for lost earnings. The court and the Postal Service seemed to believe that FitzGerald was asking the court to "restore"to him military pay which he had in fact received. See Appendix, pp. 64,66-67. In fact, FitzGerald was asking the court, albeit not in the clearest fashion, to discount from his total military earnings during the period in question those earnings which compensated him for military duty he performed whether or not he was employed by the Post Office. His argument is based on the premise that the Post Office should not be permitted to benefit from the fact that he enjoyed additional earnings during his employment as a rural carrier. This claim is supported by law. Moreover, during the proceedings the court placed the burden of proof respecting mitigation upon FitzGerald, instead of defendants, where it properly belonged. The Court also refused, incorrectly ,to consider testimony relating to earnings FitzGerald would have made from overtime work at the Post Office. Appendix,pp.124-126. It declined to hear testimony relating to travel expenses incurred by FitzGerald in obtaining other employment during the period he was refused reinstatement. Appendix, pp. 113-115. Also with respect to damages the court, on its own initiative, refused to consider attorneys fees and court costs incurred by FitzGerald in seeking reinstatement. Appendix, pp. 208-209.

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Finally, the court reinstated FitzGerald to "a comparable position within general commuting distance of his home" Appendix , pp. 35-36, instead of to his exact position in the Milton Post Office. Mr. FitzGerald steadfastly maintained throughout the proceedings that he wanted his same job restored to him. Appendix, p. 152. There was no showing that this position was unavailable or that Mr. FitzGerald was unfit to carry out the duties of that position. The court committed an abuse of discretion by refusing to restore the plaintiff to his job.

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ARGUMENT

1. THE DISTRICT COURT ERRED BY REQUIRING FITZGERALD TO OFFSET HIS LOST POST OFFICE WAGES WITH EARNINGS HE WOULD HAVE MADE HAD HE BEEN PROPERLY REINSTATED.

A. The Selective Service Act, as Recodified by the Veterans, Reemployment Rights Act, and the Case Law Pertaining thereto is the Appropriate Guide for this Court to Follow in This Case.

Some confusion arose in the lower court as to the appropriate statute to look to with respect to determining the damage claims arising from this case. Case law indicates that the Back Pay Act, 5U.S.C. § 5596, is not relevant to claims for damages arising from a wrongful refusal to reinstate after military service but rather to claims for damages stemming from " an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee..." 5 U.S.C.A. § 5596. See Fletcher v. Commissioner of Civil Service, 329 F. Supp. 1398 (ED. Tenn. 1971) where postal employee brought a suit under 5 U.S.C. §§ 701 et. seq. and 50 U.S.C.App. §§ 451 et. seq. for reinstatement because Postal Service, which had been sued for wrongful termination and back wages successfully under Back Pay Act, continued to refuse to reinstate employee, claiming he was unavailable due to military service.

The District Court properly determined that the

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Selective Service Act of 1967, 50 U.S.C. App. § 459, was relevant in determining the plaintiff's reinstatement rights, Appendix, p. 30, but seemed to rely at least partially on the Back Pay Act for claiming that FitzGerald might not be entitled to accumulated leave time. Appendix, p. 37. If the District Court was correct in its assertion that the Selective Service Act defined the rights and responsibilities between the parties with respect to reinstatement rights - and there has been no suggestion in the record to the contrary - then the same act defines FitzGerald's rights to damages.

50 U.S.C.App. §459 (b) provides in relevant part that:

> In the case of any such person who, in order to perform such training and service, has left or leaves a position... in the employ of any employer and who... makes application for reemployment within ninety days after he is relieved from such training and service... (A) if such position was in the employ of the United States Government,... such person shall -
>
> (i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status and pay...

50 U.S.C.App. § 459(c) provides that:

> (2) "...any person who is restored to a position in accordance with the provisions of paragraph (A)... of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employement.
>
> (3) Any person who holds a position described in paragraph (A)... of subsection (b)[of this section] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States.

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50 U.S.C. App. § 459 (e) provides in pertinent part:

> (1) Any person who is entitled to be restored to a position in accordance with the provisions of paragraph (A) of subsection (b) [of this section] and who was employed, immediately before entering the armed forces, by any agency in the executive branch of the Government or by any Territory or possession, or political subdivision thereof, or by the District of Columbia, shall be so restored by such agency or the successor to its functions, or by such Territory, possession, political subdivision, or the District of Columbia. In any case in which, upon appeal of any person who was employed immediately before entering the armed forces by any agency in the executive branch of the Government or by the District of Columbia, the United States Civil Service Commission finds that-
>
> (A) such agency is no longer in existence and its functions have not been transferred to any other agency; or
>
> (B) for any reason it is not feasible for such person to be restored to employment by such agency or by the District of Columbia,
>
> the Commission shall determine whether or not there is a position in any other agency in the executive branch of the Government or in the government of the District of Columbia for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the commission determines that there is such a position, such person shall be restored to such position by the agency in which such position exists or by the government of the District of Columbia, as the case may be. The Commission is authorized and directed to issue regulations giving full force and effect to the provisions of this section insofar as they relate to persons entitled to be restored to positions in the executive branch of the Government or in the government of the District of Columbia, including persons entitled to be restored under the last sentence of paragraph (2) of this subsection. The agencies in the executive branch of the Government and the government of the District of Columbia shall comply with such rules and regulations and orders issued by the Commission pursuant to this subsection. The Commission is authorized and directed whenever it finds, upon appeal of the person

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concerned, that any agency in the executive branch of the Government or the government of the District of Columbia has failed or refuses to comply with the provisions of this section, to issue an order specifically requiring such agency or the government of the District of Columbia to comply with such provisions and to compensate such person for any loss of salary or wages suffered by reason of failure to comply with such provisions, less any amounts received by him through other employment, unemployment compensation, or readjustment allowances: Provided, That any such compensation ordered to be paid by the Commission shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions, and shall be paid by the head of the agency concerned or by the government of the District of Columbia out of appropriations currently available for salary and expenses of such agency of government, and such appropriations shall be available for such purpose. As used in this paragraph, the term "agancy in the executive branch of the Government" means any department, independent establishment , agency, or corporation in the executive branch of the United States Government.

(2) Any person who is entitled to be restored to a position in accordance with the provisions of paragraph (A) of subsection(b) [of this section] and who was employed, immediately before entering the armed forces, in the legislative branch of the Government, shall be so restored by the officer who appointed him to the position which he held immediately before entering the armed forces...

The lower court notes that 50 U.S.C. App. § 459 was effectively repealed by Chapter 43 of Title 38, Appendix, p. 30, although the Court does state that the Selective Service Act contains the provisions relevant to the time frame encompassed by this case. Appendix, p. 30. In any event, the purpose of the Veteran's Reemployment Rights Act was not to revoke any protections previously extended by law but rather to "provide for the codification into Title 38 of existing law on veteran's reemployment

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rights" ...and to extend such rights to other veterans. 1974 U.S. Code Congressional and Administrative News, Legislative History, p. 6344. Furthermore, the language of 38 U.S.C. §§ 2021 et. seq. follows almost precisely to the language of the Selective Service Act cited above and, furthermore specifically includes postal service employees in its coverage. See 38 U.S.C. § 2023(a).

FitzGerald therefore submits that this Court will be appropriately guided by the Selective Service Act of 1967 and the case law developed under said Act in determining the correct method of computing lost wages.

B. The Language of the Selective Service Act Is To Be Liberally Construed in Favor of the Veteran Seeking Reemployment.

The United States Supreme Court in Fishgold v. Sullivan Corporation, 328 U.S. 256 (1946), declared that the Selective Service Act was to be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." Supra at 285. The force of this declaration has continued up to the present time. Niemann v. Alpine - Brook - Triangle Corp., 69 L.C. 24993 (S.D.N.Y. 1972).

This Court in assessing the earnings lost to the plaintiff should assure that the veteran loses nothing by the fact that he made himself available to the armed services. Loeb v. Kivo, 169 F. 2d 346, 347 (2d Cir. 1948),

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cert. denied 335 U.S. 891 (1948), citing Fishgold. It has been held, in fact, by some courts that it would be contrary to the intent of the act to permit an offending employer to benefit from his or her refusal to reinstate by permitting the employer to argue mitigation of damages. Feore v. North Shore Bus Co., 68 F. Supp. 1014, 1018 (E.D.N.Y. 1946), rev'd on other grounds, 161 F. 2d 552 (2d Cir. 1947);but see Loeb v. Kivo, supra.

C. The Burden of Proof Was on the Defendants to Prove Mitigating Earnings.

In connection with the requirement that the statute be liberally construed in favor of the returning veteran, the courts have also been unanimous in holding that the burden of proving mitigation of damages in the form of offsetting wages to lost earnings is on the employer and not the returning veteran. John S. Doane Co. v. Martin , 164 F. 2d 537 (1st Cir. 1947), cited with approval in Loeb v. Kivo, supra at 350, MacKnight v. Twin Cities Broadcasting Corp., 13 LC 71996 (D. Minn. 1947).

Neither Postal Service nor the other named defendants in the court below sustained their burden of showing that FitzGerald's military earnings should be used to offset the Postal wages lost through defendants wrongful act. In fact, the burden of showing mitigation was explicitly and

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implicitly placed on FitzGerald's shoulders, even to the extent of requiring him to prove what his total military earnings were, inclusive of earnings he would have had if he had been reemployed at ethe Post Office! Appendix, pp. 63-67, 98-109. The trial judge, as is shown in the transcript pages cited, went so far as to assume for himself the responsibility of showing that FitzGerald had offsetting military earnings.

This improper shifting of the burden of proof from the defendants to the plaintiff-appellant has resulted in a record which warrants reversal of the lower court's order denying damages to the plaintiff. The defendants, due in part perhaps to the court's intervention, never put on evidence to prove that FitzGerald's contention that he would have earned substantial portions of the military pay used to offset damages in any event was false. Without such evidence, the court could not find that mitigation of lost wages with all military earnings was appropriate, and this Court should reverse.

D. The District Court Erred in Using Earnings Plaintiff Would Have Made Regardless of His Reinstatement as Mitigation.

The record reveals that the Court in fact did use military wages which would have been earned by FitzGerald if he had been properly reinstated by the Post Office to mitigate the wages owed to him by the Post Office due

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to wrongful denial of reinstatement. If the record is reviewed and some calculations performed, it will be clear that the court did as is stated above. For example, FitzGerald calculated his wage loss for 1973 in the following fashion:

$12,889.79 = Post Office Earnings
- 479.28 = Leave Without Pay (LWOP)
12,410.51

Add:	$ 1,299.25	active duty
work he	1,213.80	drills
would have	3,274.11	drills
performed	3,897.75	active duty
if Postal		
employee:	9,684.91	

TOTAL: $22,095.42

Subtract: $17, 157.98 total military wages which included
$9,684.91

Net wage loss: $4,937.66.

See Appendix, p. 66.

If FitzGerald had simply subtracted $9,684.91 from total military earnings of $17,157.78, he would have had military wages earned in lien of Postal Service wages of $7,472.87. This latter figure then would be subtracted from $12,410.51 to yield the net wage loss of $4,937.64 [a discrepancy of 2¢ due to improper calculations in the transcript].

The question then becomes whether these additional earnings are properly used as mitigation. The answer is no. Although research has failed to uncover a case directly on point, analogous fact situations have been

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adjudicated by the courts and provide adequate guidance for a decision in FitzGerald's favor. In the case of Helton v. Mercury Freight Lines,444 F. 2d 365 (5thCir.1971), the federal court for the fifth circuit was faced with an appeal by a veteran who claimed that the lower court had erred in applying overtime wages earned by the appellant in the incorrect job the respondent employer had provided to him upon reinstatement as mitigation against the wages which would have been his on the straight time correct position.

The employer, in Helton had apparently cited to Loeb v. Kivo, supra. for the proposition that all earnings during the period of non-reinstatement were mitigation. However the Loeb decision did not in any fashion consider a fact situation in which some earnings were a result of additional work performed by the veteran which would not have interfered with his full-time work duties with the offending employer. The Helton court rejected the employer's argument by holding that

> A more inclusive formulation drawn from the legislature's overall purposes, is that the veteran should be made whole, and reimbursed for the measurable wage disadvantage or loss suffered through his incorrect reinstatement..." Accardi v. Pennsylvania R.R., 383 U.S. 225, 228...; Fishgold v. Sullivan Drydock & Repair Corp. , 328 U.S. 275,284,285... The specific application of that principle to the situation before us would be that he should not have had to work longer hours at the lower pay in order to earn the amount of salary he would have had at the superior grade - and is entitled to monetary compensation for that deprivation." Supra at 367.

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In MacKnight v. Twin Cities Broadcasting Corp., supra, the Minnesota federal district court held that wages earned from extra work performed during hours that would not have intruded on the time that would have been required to discharge the veteran's duties with the defendant could not be considered mitigation. Supra at 71,997 .

Plaintiff's uncontradicted testimony is that he had half time employment throughout the period that he was seeking reinstatement. Appendix p. 98. See also Appendix pp. 106 - 108. At the court's request he provided Exhibit 1W, Appendix, pp. 170-174, which summarized his activities during the reinstatement period. Also undisputed is his claim that he performed,while at the Post Office,drills, active duty, and other military obligations for which he was compensated. Appendix p. 90. Furthermore, the Post Office admits that each year FitzGerald was entitled to a number of leave days for which he was nevertheless paid. Appendix, pp. 73-83,100-101. The court accepted FitzGerald's assertion that 90% of this leave time was used to perform military duties. Appendix, p. 37, See also Appendix, pp. 89-90.

The Court and the defendants seemed to perceive to some degree that the issue was one of whether

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part time earnings outside of regular employment could be used as mitigation. Appendix, pp. 94-97. The conclusion that such earnings, even if they would have been available to the employee if he had been reinstated, could be considered mitigation is incorrect. This Court should reverse the lower court's decision to deny plaintiff damages in the form of lost wages and remand the cause to the court for hearings as to the amount of wage loss sustained by FitzGerald as a result of his being wrongfully refused reinstatement.

There has been, as previously noted, some claim that the Back Pay Act may govern the decision in this case. However, FitzGerald submits that nothing in the Back Pay Act would militate against his being restored the Postal wages due him. FitzGerald was not requesting the Court to award him accumulated leave time which was not ordinarily compensated but to treat him as if he were actually employed by the Post Office. It was agreed that FitzGerald had a certain amount of compensated leave time available to him each year. Ainsworth v. United States, 399 F. 2d 176 (Ct.Cl. 1968), dealing with reinstatement rights to the F.A.A.

Moreover, the general legal principles of mitigation are in accord with FitzGerald's position. The law as to the employee's duty to mitigate damages requires him or her to seek other reasonable employment. However, earnings

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resulting from work which could have been performed while employed with the offending employer are not to be considered as mitigation. Williston on Contracts, Vol II, § 1359 (Third Edition 1968).

2. THE PLAINTIFF-APPELLANT IS ENTITLED TO COMPENSATION FOR OVERTIME WORK HE WOULD HAVE PERFORMED HAD HE BEEN REINSTATED.

The lower court sustained objections to FitzGerald's repeated attempts to testify about overtime work that had occurred on his route during the period he was denied reinstatement. This action by the court was contrary to the law and the cause should be remanded for hearing as to the amount of overtime work performed on FitzGerald's route and the loss he sustained by being prevented from doing that work.

The established legal principle under the Selective Service Act is that the plaintiff be made whole"... [T]he Act was entended to maintain the veteran equal in all respects to those who stayed behind." Loeb v Kivo, 77 F. Supp. 523 (S.D.N.Y. 1947), Aff'd 169 F. 2d 346. In Loeb, the Second Circuit Considered the case of whether it would be appropriate to compensate the returning veteran according to wages earned by his replacement during a period of unprecedented prosperity for the business. The Court held that

> Plaintiff's damages... are properly determinable by reference to Meyer's earnings for the period in question, less whatever he earned on his own during that time. The fact that plaintiff's 1946 earnings thus become greatly increased over his 1942 earnings does not matter, since he was entitled to share in the war-fostered prosperity of the firm. 169 F2d at 351.

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In Accardi v. Pennsylvania R. Co, 383 U.S. 225 (1966), the Supreme Court ordered the Pennsylvania Railroad to calculate petitioners' severance pay on the basis of their length of compensated service with the railroad, including in that time the period petitioners were actually serving in the armed forces. The principle is that "the returning veteran is to be treated as though he has been continuously employed during the period spent in the armed forces." 383 U.S. at 228.

FitzGerald's attempt to calculate lost overtime wages for the period during which he was denied reinstatement was not "speculative" as claimed by the defendants, Appendix, p. 125, particularly in light of the fact that his route was in existence during the period in question. Appendix,pp. 124-126. The lost overtime represents wages FitzGerald would have had if he had been reinstated. He was entitled to testify as to the amount of wage loss sustained and to be compensated for it. This Court is therefore asked to reverse and remand on this point.

3. THE PLAINTIFF-APPELLANT IS ENTITLED TO DAMAGES STEMMING FROM HIS ATTEMPTS TO MITIGATE HIS LOSSES AND TO SEEK REINSTATEMENT.

FitzGerald claimed that he spent $4,263.84 in mileage costs commuting to and from work he took while attempting to gain reinstatement. His uncontradicted testimony was that mileage in his Post Office job was compensated and that he drove the same number of miles in his replacement employment. Appendix,

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pp. 113-116.

In Helton v Mercury Freight Lines, supra at 367, the Fifth Circuit enunciated the principle that the veteran should be compensated for "the measurable wage disadvantage or loss suffered through his incorrect reinstatement. Williston on Contracts, Section § 1359 (3d Edition 1968), states that "In enhancement of his damages, the employee is entitled to recover expenses reasonably incurred in seeking employment, like other losses caused by reasonable attempts to mitigate damages."

Since the travel money was incurred by FitzGerald in his efforts to mitigate damages and because he would have been reimbursed for these expenses if he had been properly employed, the lower court erred in not compensating FitzGerald for this loss.

The court further disallowed attorney's fees and court costs amounting to at least $656.00. Appendix, pp. 120-121, The record does not make clear why FitzGerald was represented by private counsel, 50 U.S.C.App. § 459(e) requires the Civil Service Commission to ensure proper reinstatement. Furthermore, it is the law that costs cannot be taxed against the veteran Salzman v. London Coat of Boston, Inc., 156 F. 2d 538 (1st Cir. 1946).

FitzGerald should be awarded damages incurred as a result of attorney's fees and court costs sustained both at the trial court level and on appeal.

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4. THE COURT ERRED IN REFUSING TO RESTORE FITZGERALD TO HIS POSITION AT THE MILTON POST OFFICE.

In his complaint, FitzGerald requested that the court reappoint him as a rural carrier with the Milton, Vermont, Post Office and restore to him all the rights and privileges which he would have enjoyed if he had been appropriately reinstated. During the trial, Mr. FitzGerald reaffirmed his desire to be reinstated at the Milton Post Office in the following exchange:

> Q. Is your statement that you would return to the Postal Service limited to returning to Milton?
>
> A. I want to return to the Milton Office, but if I was ordered to go some other place, I guess I would have to go. Appendix, p. 152.

The trial court in its order, apparantly took this statement as a waiver and permitted the Postal Service to restore the plaintiff to a position "within general commuting distance of... his home." Appendix, pp. 35-36. The court considered 35 miles to constitute such commuting distance. Appendix, p. 42. Under relevant case law, Mr. FitzGerald's statement was not a waiver. Loeb v. Kivo, 77 F.Supp. 523 (S.D.N.Y. 1947).

As cited above, 50 U.S.C.App. §459 (b) requires the government to restore an employee to his or her own position if such person is "still qualified to perform the duties of such position or to a position of like seniority, status and pay." Mr. FitzGerald was placed in the position of rural carrier in St. Albans, Vermont. He must commute to work

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34 miles round trip as opposed to four miles round trip to his former position in Milton. Other disabilities have resulted as a result of reinstatement pursuant to the Court's order.

There is no evidence in the record to support the court's order permitting reinstatement to another position except that the requested position was filled. See Appendix, p.35. There is no indication that the Post Office could not readily open FitzGerald's position in Milton for him without seriously dislocating other employees or work assignments. The purpose of the statute in permitting the employer to restore a veteran to a position of like seniority, pay, and status, was "to give the employer leeway in adjusting to the dislocations caused by the departure of men in great numbers to fill the armed services..." McCormick v. Cornett - Partsnett Systems,Inc., 67 LC 23742 (M.D. Tenn. 1972), where the court held that the employer could not place the veteran in a similar position in another state, noting that the employer had not offered to compensate the veteran for moving expenses, supra at 23,744. Similarly, the Idaho district court ordered reinstatement to the veteran's precise position in the defendant's store in the same city as opposed to a neighboring city. Mihelich v. F.W.Woolworth Co., 69 F. Supp. 497 (D. Idaho 1946). See also Atlantic Tobacco Co. v. Morganti, 67 LC 23,170 (S.C. 1971), Loeb v. Kivo, 77 F.Supp. 523 (S.D.N.Y. 1947).

It might be argued that in each of these cases, the veteran produced evidence to show that he was somehow disadvantaged by the proposed reemployment and on that basis, these

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cases are distinguishable from FitzGerald. However, FitzGerald's was never informed as to what position, if any, he was to be restored and was therefore precluded from proving any disadvantages which might result and which, in fact, have resulted.

The court does inform FitzGerald in its order that he has recourse to the Civil Service Commission if he is not replaced according to the court's order. Appendix, p. 42. The objection to this approach is that FitzGerald is left to commence a new series of litigation to obtain restoral to a position illegally denied him since September of 1972. If the court had properly ordered reinstatement to his exact position or a similar position in the Milton Post Office, the door would not have been open to defendants to place FitzGerald in a disadvantageous position.

CONCLUSION

For the reasons stated above, this Court is asked to provide the following relief:

1. Reverse the lower court's decision to mitigate damages by applying to FitzGerald's lost wages earnings from military duty he would have performed if he had been employed by the Post Office;

2. Reverse the lower court's ruling and remand for a hearing to consider the exact amount of wages ,including overtime ,and damages, including travel, costs and attorneys fees, incurred by

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FitzGerald as a result of being wrongfully refused reinstatement; and

3. Reverse the lower court's ruling and order that Mr. FitzGerald be restored to his exact position or a position of similar pay, status, and seniority at the Milton Post Office.

Respectfully submitted for the plaintiff-appellant,

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RE: FitzGerald V. Devarney et. al.

CERTIFICATE OF SERVICE

I Nancy E. Kaufman, Esquire hereby certify that on the 30th day of July, 1976. I sent by First Class Mail to John Hughes, Esquire the foregoing Appendix and Brief.

Nancy E. Kaufman, Esquire

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